



# Comments on Policy vs. Implementation

Status: FINAL  
Version: 4  
5-Mar-2013

**Business Constituency Submission**

**GNSO//CSG//BC**

As a result of recent proposed changes to the new gTLD Program, delineating between Policy and Implementation has become a focal point of discussion within the ICANN Community.

The Business Constituency (BC) appreciates that ICANN Staff has taken this issue head-on and has undertaken work to describe the various questions at hand.

While we look forward to participating in further discussions at the Beijing meeting regarding this topic, please find below the BC's current thinking.

First, the BC asks that any framework adopted must seek to address any changes to Policy for the long-term, not just those related to the new gTLD Program. The framework should be fundamentally forward-looking, and should not be driven solely by concerns about current debates. Once developed, the framework should also provide predictability to all parties: that is, parties should know *ex ante* with some amount of certainty whether a particular type of change will be subject to a PDP or some other process, how they can participate in that process, and how a decision will eventually be made.

Second, the BC supports identifying the proper process to follow when there are changes to Policy recommendations. Clarity must be provided to determine whether there should be a new PDP or whether the use of public comment shall suffice. The BC asks that implementation details that are recognized during a PDP be addressed as part of the PDP process, as opposed to leaving that detail to Community Implementation Review Teams. Furthermore, in cases where the GNSO has been asked to provide "policy advice", the BC recommends that a formal approach for developing such advice be developed.

The BC agrees with Staff that changes related to administrative updates, error corrections and clarification of prior obligations should be considered Implementation.

Next, the BC asks that rules that impose **material new obligations** should be considered Policy. Basic notions of fairness suggest that people must be given notice and an opportunity to respond before a material new obligation is imposed upon them. (At the end of these comments, the BC applies this test of *material new obligation* to Strawman solutions 1 - 4.)

The BC also suggests that ICANN adopt a **PDP-lite** process for policy or implementation that warrant public comment and rigorous process. At a minimum, new obligations that are not considered material should be subject to this process. For these types of circumstances, ICANN should use this opportunity to develop a more lightweight process that moves more quickly than the PDP process but nevertheless provides predictability, transparency, and accountability in decision-making.

In addition, the BC is supportive of the Staff recommendation that all Policies are clearly separated from existing documents and publicly posted. A table of policies with their title, effective date, changes, and other relevant information is a crucial set of information that should be pulled together as soon as possible and made easily accessible on the ICANN web site.

Finally, in instances where competing “policy advice” is given by different Supporting Organizations or Advisory Committees to the ICANN Board, we ask the ICANN Board choose that path of acting in the public interest in all cases.

### **Test Case: The Strawman Solution**

The best way to test any framework to distinguish policy from implementation is to apply the framework to a real-world example, and then evaluate whether the result makes sense.

An example that begs for testing is the so-called **Strawman** solution for rights protection measures. Using the BC’s recommended distinction of whether “material new obligations” would be created, here’s how we see the Strawman solutions breaking down between policy and implementation:

***Strawman Solution #1: All new gTLD operators will publish the dates and requirements of their sunrise periods at least 30 days in advance. When combined with the existing (30-day) sunrise period, this supports the goal of enabling rights holders to anticipate and prepare for upcoming launches.***

The 30-day Sunrise period is an existing obligation for new gTLD operators. Strawman solution #1 adds an advance notice of 30 days before the required sunrise period begins.

This advance notice imposes no material new obligation on registry operators. First, the electronic posting of an advance notice would not obligate the registry to any significant publication costs. Second, the advance notice would not obligate the registry to delay the public sale of domains, since the registry is likely to plan their sunrise marketing and technical testing at least 30 days before officially opening the sunrise period. A 30-day notice would fit within that existing marketing and development cycle without raising costs or causing delay.

Existing GNSO policy requires that the new gTLD program not "infringe on the legal rights of others". The obligation to post a 30-day advance notice fits within that policy and would create no material new obligations, so it would therefore be a matter of implementation.

***Strawman Solution #2: A Trademark Claims period, as described in the Applicant Guidebook, will take place for 90 days. During this “Claims 1” period, anyone attempting to register a domain name matching a Clearinghouse record will be displayed a Claims notice showing the relevant mark information, and must acknowledge the notice to proceed. If the domain name is registered, the relevant rights holders in the Clearinghouse will receive notice of the registration.***

Registries have an existing obligation to provide Claims notices for 60 days. Strawman solution #2 extends that obligation to 90 days. The additional 30 days will not cause any increase in costs or resources for development or testing, since the claims notice system will have already been developed and tested.

An additional 30 days of operating the claims notice system could conceivably increase operating costs, but not by a material amount. Registry operators will leave the claims notice software in place, which incurs no material costs since systems will have already been sized to operate the software for the previously required 60 days. Registry operators may incur some additional personnel costs to respond to technical problems and questions from registrars and registrants during days 61-90, but there is no reason to believe these costs will be material.

Existing GNSO policy requires that the new gTLD program not "infringe on the legal rights of others". The obligation to extend Claims notices from 60 to 90 days fits within that policy and would create no material new obligations, so this is therefore a matter of implementation.

***Strawman Solution #3:*** *Rights holders will have the option to pay an additional fee for inclusion of a Clearinghouse record in a "Claims 2" service where, for an additional 6-12 months, anyone attempting to register a domain name matching the Clearinghouse record would be shown a Claims notice indicating that the name matches a record in the Clearinghouse.*

Registries have an existing obligation to provide Claims notices for 60 days (90 days if Strawman solution #1 is approved). Strawman solution #3 would create an obligation for registries to continue operating their notice processes for an additional 3-9 months.

The extension of claims notices should not cause any increase in costs or resources for development or testing, since the claims notice system will have already been developed and tested.

An additional 3-9 months of operating the claims notice system could cause Registry operators to incur additional personnel costs to respond to technical problems and questions from registrars and registrants. If registries expect or experience costs that are material, they should be able to recover these added costs through the additional fees paid by rights holders using the service.

Existing GNSO policy requires that the new gTLD program not "infringe on the legal rights of others". The obligation to offer Claims 2 notices fits within that policy and would create no material new obligations since additional costs would be compensated, so this is therefore a matter of implementation.

***Strawman Solution #4:*** *Where domain labels are determined to have been abusively registered or used (e.g., as a result of a UDRP or court proceeding), a limited number (up to 50) of these may be added to a Clearinghouse record (i.e., these names may be mapped to an existing record for which the trademark has already been verified by the Clearinghouse). Attempts to register these as domain names will generate the Claims notices as well as the notices to the relevant rights holders (for both Claims 1 and 2).*

Registries have an existing obligation to provide Claims notices for 60 days (90 days if Strawman solution #1 is approved, up to 12 months if Strawman #3 is approved).

Strawman solution #4 would create no material new obligation on registries or registrars. Rather, the existing (or extended) obligations to generate notices would be based upon a larger database of strings that would trigger the notices.

The addition of up to 50 records for each TM in the clearinghouse will not cause any increase in costs or resources for development or testing, since the claims notice system will have already been developed and tested. Nor would the additional records have any material impact on operating costs during the period when claim notices are required.

Existing GNSO policy requires that the new gTLD program not "infringe on the legal rights of others". The obligation to offer Claims notices on an expanded list of strings fits within that policy and would create no material new obligations, so this is therefore a matter of implementation.

Elisa Cooper acted as rapporteur and several BC members contributed edits during the review period from 19-February through 5-March, in accordance with our charter.